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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TAVIO LEROY DANIELS, Defendant and Appellant.	B145452 (Super. Ct. No. TA102584)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed.

Law Offices of John R. Blanchard and John R. Blanchard, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Brad L. Levenson and Nora Genelin, Deputy Attorneys General, for Plaintiff and Respondent.

Tavio Leroy Daniels appeals from the judgment entered following his conviction by jury of possession of marijuana for sale (Health & Saf. Code, § 11359), following the denial of a suppression motion (Pen. Code, § 1538.5).[1] He was placed on formal probation for three years. Defendant argues that his consent to search his vehicle was obtained during an unlawful detention and therefore the narcotics discovered during that search should be suppressed. As we conclude that the five minute detention of defendant (and the passengers in his vehicle) was lawful, and as we also find without merit defendant's claim of instructional error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The record establishes that on March 4, 2000, defendant possessed for sale about 45 grams of a substance containing marijuana in Los Angeles. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The issue critical to this appeal, however, revolves around the defendant's motion, brought pursuant to section 1538.5 to suppress the use in evidence of that illegal substance.

With respect to that issue, the evidence established that on March 4, 2000, Los Angeles Police Officers Ray Puettmann and Ken Williams were assigned to South Bureau Crash, a gang unit. At about 2:45 p.m., they were on patrol in a marked patrol car. Puettmann was driving northbound in the number two lane of Central approaching Imperial Highway when he observed a Cadillac, traveling northbound in the number one lane, pass the patrol car. The driver of the Cadillac, in violation of Vehicle Code section 21460, subdivision (a), drove the Cadillac across the double yellow lines before entering

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

the left turn lane. Puettmann "[ran] a wants and warrants" check on the Cadillac, and it "came back clean."

Puettmann then conducted a traffic stop. He did so because of the traffic violation and because one of the Cadillac's taillights was broken. In the interest of officer safety, however, Puettmann ordered the four occupants of the Cadillac to exit. He did so "because of the location. The intersection with Imperial and Central is Bounty Hunter Blood neighborhood, very violent, very active. And we had four passengers in the vehicle, so they outnumbered us."

Defendant, who was driving, and his three passengers exited the vehicle as requested. At that time, Williams recognized one of the passengers, Lionel Harris, as an "active known" "94 Hoover Crips" gang member who was then on probation; "the gang which he belonged to was a rival of the gang area that they were in." This circumstance immediately changed the focus of the officers from the traffic violation to a concern about weapons and just who Harris's companions (including defendant) were and what they were doing in this particular area. Even though, as it turned out, defendant was not a gang member, "it isn't uncommon for someone associated with that gang member, a friend, family, associate, to carry or conceal or hold for that person a weapon." As a result, with Williams standing guard on Harris, Puettmann conducted a pat down search of defendant, Harris and the other two passengers for the purpose of officer safety. No weapons were found. Defendant makes no complaint about such search.

At the conclusion of the pat down search, Puettmann collected the "I.D.'s and driver's licenses" from defendant, Harris and the other two passengers. While Williams was using the patrol car's radio to check for wants or warrants, Puettmann asked

defendant for permission to search the car. Although initially hesitant, defendant ultimately consented.[2] Puettmann testified that it was "common procedure" when making a traffic stop *in this area* to ask permission to search the vehicle.

After he obtained defendant's consent to search the vehicle,[3] Puettmann conducted that search and discovered the marijuana that led to the conviction of defendant that is now before us. Prior to the trial of this matter, defendant moved to suppress this evidence under section 1538.5. He argued to the trial court that his detention by the police was unreasonable in the circumstances and was therefore unlawful. As it was during such detention that his consent to search the vehicle was obtained, defendant argues that such consent was therefore vitiated.

The trial court heard the testimony of Puettmann and Williams and concluded that the *five minute period* from the initial traffic stop until the search of the vehicle was *not* unreasonable. Indeed, the court said, it took no longer than it would have to write defendant a citation for his traffic violation(s). Under the particular circumstances here involved, the court concluded, the field investigation conducted by the officers was entirely proper. Defendant's motion to suppress was denied.[4] The case went to trial and,

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[2] There is no claim in this case that such consent was not voluntary.

[3] Defendant makes no claim that his consent to search was not voluntarily given; he argues only that such consent is made invalid by the "illegal" detention.

[4] The trial court announced its decision to deny defendant's motion in the following terms: "Well, what is not in issue based on this evidence is that they did have probable cause to stop. Defense [exhibit] D is the picture that talks about going -- or shows what the officers testified is going over a double yellow line, basically making the left-hand turn lane longer, which we probably all have done, but it would be a reason to stop and cite the taillight, even though I don't know if it was operable or not. It looks like it's broken at the top. So I think based on this evidence there was a violation of the vehicle code and they could stop the defendant. [¶] Also, there is no issue based on what I've

as indicated above, defendant was convicted and sentenced to probation. Defendant has filed this timely appeal.

CONTENTIONS

Defendant's principal contention is that the trial court erred in denying his motion to suppress. Essentially, he argues that the police improperly stopped his vehicle, unlawfully detained him while conducting an unreasonable investigation into matters *not* related to the traffic stop and therefore unlawfully obtained defendant's consent to a search of his vehicle. Defendant also contends that the trial court improperly failed to instruct the jury, *sua sponte*, on the lesser included offense of simple possession.

The People dispute both of these contentions.

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heard that he consented to search the vehicle. There is no indication that Puettmann had that it was involuntary. So the issue really is: Was it a reasonable delay between the time of the stop and the time of the search and was it longer than necessary to cite the defendant? [¶] That's why one of the first questions I asked was how long was it? Cases do go a lot of different ways and just the number of minutes or seconds isn't -- As counsel said, there is no bright line as to what's long enough or what's not. Oftentimes you stop the vehicle and things develop as the stop incurs. [¶] In this situation based on the number of occupants in the vehicle, I don't think it was illegal for the officers to order them out. Upon ordering them out, they recognized that somebody was a gang member in a rival territory which creates all sorts of, as the officer said, reasons to why they're there. [¶] To not further investigate that which is of more serious than a traffic violation I think would have been improper. I don't think there is anything under these developing circumstances which would have said, Okay, I know you are a gang member. I know you are in a rival area. You shouldn't be here, but I don't want to take those issues up. I want to issue a cite and get you out of here, when the evidence is that they want to investigate their associates. It took four to five minutes. A citation wouldn't have been written in four to five minutes. . . . [Counsel's interruption.] . . . [¶] So everything that they did in those four or five minutes weren't for the purposes of delaying your client. They were for the purposes of investigating this gang member. I don't think the stop was unreasonable. Now, yeah, if it was 25 minutes, maybe it would be different. *But based on the totality of the circumstances*, I thought the detention was not unreasonable to the time of the stop and to the search. So the motion is denied." (Italics added.)

DISCUSSION

1. *The Defendant Was Not Unlawfully Detained*

Defendant's vehicle was stopped by the police because of a traffic violation. There is no dispute about that fact and the trial court, on substantial evidence, so found. However, after the occupants of the vehicle stepped out of it at the officers' request, what had initially been a traffic investigation became something else entirely.[5]

Investigative activities beyond the original purpose of a traffic stop are permissible so long as they do not prolong the stop beyond the time it would otherwise take. (*People v. Bell* (1996) 43 Cal.App.4th 754, 767; *United States v. Shabazz* (5th Cir. 1993) 993 F.2d 431, 435-436.) The Fourth Amendment prohibits only unreasonable searches and seizures. (*Florida v. Jimeno* (1991) 500 U.S. 248; *Scott v. United States* (1978) 436 U.S. 128, 127; *In re Lance W.* (1985) 37 Cal.3d 873, 881.) To justify an investigative detention, there must be articulable facts leading to a suspicion that some activity relating to a crime is about to occur or has occurred and that the person the officer intends to detain is involved in that activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 22.) In short, a reasonable suspicion of involvement in criminal activity justifies a temporary stop or detention. (*People v. Souza* (1994) 9 Cal.4th 224, 230; *Terry v. Ohio, supra,* 392 U.S. at p. 22.)

As the trial court correctly concluded, there was substantial evidence presented at

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[5] As Puettmann testified, "We stopped the vehicle for the above violations. At the time that we had everybody step out of the vehicle and recognized that one of them was an active and known gang member who was on probation and had search-and-seizure conditions, at that time our investigation took us in a different direction because now we know that we have someone who is active, is doing things illegally and so I'm going to pursue that angle before I come back and finish my investigation in regards to the traffic violations."

defendant's motion to suppress demonstrating the basis for a *reasonable suspicion* that defendant and his passengers were engaged in criminal activity. As the testimony of the officers made clear, (1) one of defendant's passengers (Lionel Harris) was known by the officers to be a member of a gang known as the 94 Hoover Crips and was then on probation, (2) Harris was not only a gang member but the officers were aware that he had been involved in the sale of narcotics, (3) defendant and the other two passengers were not known to the officers and so a concern also existed that they might be members of the same gang, (4) the officers had a legitimate interest in, and a right to determine, just who Harris was associating himself with, (5) defendant's vehicle was in the territory of another gang known as Bounty Hunter Bloods that was very violent and very active and was a rival of the 94 Hoover Crips,[6] and (6) the officers were "kind of shocked" to see Harris in this neighborhood; they had never seen him there before.

As the Supreme Court of the United States has recently emphasized "The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. [Citations.] Because the 'balance between the public interest and the individual's right to personal security,' [Citation.] tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot,' [Citations.] . . . [¶] When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the '*totality of*

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[6] The officer's testimony made clear that it was very "*uncommon* [for officers] to see a Hoover Crips in the area of a Bounty Hunter Blood."

the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. [Citation.] This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " (*United States v. Arvizu* (2002) ___ U.S. ___, ___. [02 DAR 499, 501, filed January 15, 2002, No. 00-1519], italics added.) We have no trouble concluding that the totality of the circumstances presented here justified the officers' conduct of a brief field investigation to determine just who defendant and the other two passengers were and whether there were any outstanding wants or warrants on them. In addition, the completion of the field interrogation ("FI") cards was routine and unremarkable[7] and a legitimate part of such a field investigation.

Moreover, as the trial court found, the stop of defendant's vehicle took no longer than it would have taken to write a citation. That the traffic "investigation" took a different turn was entirely justified, yet it consumed a not unreasonable period of time. We agree with the People that this case is similar to *United States v. Torres-Sanchez* (9th Cir. 1996) 83 F.3d 1123, which upheld a consensual search of a vehicle following a 20-minute "detention." In *Torres-Sanchez*, officers stopped a pickup truck in Nevada for speeding, lack of license plates, and illegally tinted windows. The driver was very

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[7] As Puettmann testified, "Whenever we have contact with a citizen, we are obligated to do one of several things depending on the type of stop. If we are not going to cite them, we need to gain some type of information so if they were to come back and make a complaint or if there would be any question about the stop later, we would have documentation showing that we stopped this person at this place and who else was involved. So either they get a citation, they get a field interview card or they get -- in addition, they also get a business card."

nervous. The occupants said they were going to Twin Falls, Idaho, and could not produce a vehicle registration. They first said the truck belonged to the sister-in-law of one of the occupants. (*Id.* at p. 1125.) After the officer ran a check on the driver's license and returned to the truck, the occupants indicated the truck belonged to the sister-in-law of a different passenger, though the officer acknowledged this seeming inconsistency may have been attributable to a language barrier. (*Ibid.*) The officer noticed a strong smell of cologne in the car. He was suspicious the car might be stolen or involved in transporting drugs. The officer told the occupants he was not going to issue a traffic citation. He asked the passenger who was most recently claimed kinship with the car owner, Sanchez, to step back to the patrol car, then invited him to sit inside due to the cold weather, and questioned him. Sanchez said they were on their way to visit his aunt in Idaho, yet he did not know her address. (*Ibid.*) The officer returned to the pickup with further questions. He asked the other passenger (who had previously claimed kinship with the owner) for consent to search, and she said she had not objection, it was not her vehicle. The officer turned to the patrol car and asked Sanchez for consent to search. He gave consent and the search revealed illegal drugs. (*Id.* at p. 1126.)

The Ninth Circuit affirmed denial of the defense suppression motion in *Torres-Sanchez.* The appellate court rejected Sanchez's arguments that the officer's questions exceeded the scope of the detention, and the detention was unreasonably prolonged. (*United States v. Torres-Sanchez, supra,* 83 F.3d at pp. 1127-1128.) The officer had a reasonable suspicion the vehicle might be stolen (although it had not been reported as such).

Similarly, in *People v. Bell, supra,* 43 Cal.App.4th at pages 767-768, the appellate

court held that questions by a police officer, that were unrelated to the purpose of the traffic stop but did not add to the delay otherwise resulting from the traffic stop, did not exceed the scope of the initial, lawful traffic detention. In addition, in *United States v. Shabazz, supra*, 993 F.2d at pages 437-438, the federal appellate court held the police officers could properly ask the driver about his travels and request consent to search the car during the time the officers were waiting for the results of a computer check on the driver's license.

Even the two cases ruled upon by defendant, *People v. McGaughran* (1979) 25 Cal.3d 377 and *Williams v. Superior Court* (1985) 168 Cal.App.3d 349, support the conclusion we reach here. Both of these cases indicate that investigative activities beyond the original purpose of a traffic stop, including warrants checks, are permissible *as long as they do not prolong the stop beyond the time it would otherwise take*. (*People v. Bell, supra,* 43 Cal.App.4th at p. 767.) In *McGaughran,* the officer, after stopping a car for a traffic violation, extended the detention to run an arrest warrant check for the car's occupants. Some ten minutes later, the officer learned there was an outstanding warrant for the driver. The driver was arrested and the car was searched. (*People v. McGaughran, supra,* 25 Cal.3d at pp. 581-582.) While the time taken by the officers to run a radio warrant check was found not to be reasonable in *McGaughran*, that court held that if such a check can be completed within the same period of time necessary to discharge the duties incurred by the traffic stop, then the warrant check is not improper because it would not add to the delay already lawfully experienced by the offender as a result of his violation. (*Id.* at p. 584.) As the *Williams* court itself emphasized, "The import of *McGaughran* is not the setting of a general outside time limit for minor traffic

offense detentions. Implicit in the *McGaughran* analysis is a recognition that the circumstances of each traffic detention are unique and that the reasonableness of each detention period must be judged on its particular circumstances." (*Williams v. Superior Court, supra,* 168 Cal.App.3d at p. 358.)

Williams similarly indicated that investigative activities beyond the original purpose of a traffic stop, including warrant checks, are permissible as long as they do not prolong the stop beyond the time it would otherwise take. (*People v. Williams, supra,* 168 Cal.App.3d at p. 358.) That the facts in *Williams*, like in *McGaughran*, demonstrated an excessive delay resulting in an unnecessary extension of a traffic detention, does not alter the general principles that we find controlling here. In *People v. Bell, supra,* 43 Cal.App.4th 754, the court summarized the impact of these two cases. "*McGaughran* and *Williams* indicate that investigative activities beyond the original purpose of a traffic stop are permissible as long as they do not prolong the stop beyond the time it would otherwise take. Federal cases are generally in accord. [Citations.]" (*People v. Bell, supra,* Cal.App.4th at p. 767.)

On the record before us there was no unnecessary extension of a traffic detention. The totality of the circumstances justified the officers' further inquiries and they were completed within a reasonable period of time. We thus conclude that defendant was not subjected to an unlawful detention and that his voluntary consent to a search of his vehicle occurred during the period when the officers were engaged in lawful investigative activity.

2. *The Trial Court Did Not Err In Failing To Instruct On A Lesser Included Offense*

When the trial court indicated, after an off the record discussion with counsel, that

it was *not* going to instruct on a lesser included offense, and requested defendant's concurrence, his counsel stated "Yes" and declined any further comment. While the People argue that this constituted a waiver, we do not need to reach that argument. (See, § 1259; *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.)

We agree with the People that there was no substantial evidence to support such an instruction in any event. "Due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 507.) Such evidence must be sufficiently substantial to warrant the trier of fact finding beyond a reasonable doubt the elements of the lesser included offense. (*Id.* at p. 508.)

Here, the uncontradicted evidence was that defendant committed a narcotics "sales" offense. Puettmann recovered from the Cadillac's rear seat a plastic grocery bag containing 13 clear baggies containing marijuana, one baggie containing marijuana, and several clear unused baggies. Puettmann asked whose marijuana was found in the car, and defendant stated, " 'It's mine. The dope is mine.' " When asked by the officer how long the marijuana had been in his car and where he obtained the marijuana, defendant stated that he had obtained it from a friend and it and been in his car for two to three days. Defendant denied selling marijuana. Los Angeles Police Department Officer Trevor Larsen testified to the opinion that the amount of bags appeared to be packaged in increments for sales or distribution, and the clear, unused baggies could be used for additional packaging. Officer Puettmann recovered approximately $35 from defendant's person which consisted of one $20 bill, two $5 bills, and five $1 bills, all of which were all completely separate, crumpled and loose in defendant's pocket. Puettmann opined that the denominations recovered were consistent with sales. No drug paraphernalia was

recovered from inside the car of from defendant's person. Defendant did not testify at his trial and he offered no witnesses on his behalf. The trial evidence indicated only that defendant possessed the 13 small separate bags containing marijuana, one larger bag containing marijuana, and several small unused baggies, *for sale*. Thus, there was no substantial evidence that would support the conclusion that defendant was guilty of only simple possession.

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P. J.

KITCHING, J.